

LLEWELLYN B. GRIFFITH

JULY 2, 1952.—Committed to the Committee of the Whole House and ordered
to be printed

Mr. LANE, from the Committee on the Judiciary, submitted the
following

REPORT

[To accompany H. R. 5398]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5398) to confer jurisdiction upon the Court of Claims to hear, determine and render judgment upon the claim of Llewellyn B. Griffith, having considered the same, report favorably thereon with amendment and recommend that the bill do pass.

The amendment is as follows:

Page 2, line 13, change the period to a colon and insert the following:

Provided, That the passage and approval of this legislation shall not be construed as an inference of liability on the part of the Government of the United States.

The purpose of the proposed legislation is merely to confer jurisdiction upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Llewellyn B. Griffith for retirement as an emergency officer under the provisions of Emergency Officers Retirement Act or as a disabled officer of the Regular Army of the United States.

STATEMENT OF FACTS

A memorandum filed with this committee by Thomas H. King and Richard L. Merrick, attorneys for claimant, sets forth the background and history of this proposed legislation.

The committee is of the opinion that Captain Griffith's claim should be given consideration to the extent requested in the bill, and recommends favorable consideration of the bill as amended.

The memorandum of Attorneys King and Merrick is attached hereto and made a part of this report.

DEPARTMENT OF THE ARMY,
Washington 25, D. C., February 8, 1952.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CELLER: Reference is made to your letter inclosing a copy of H. R. 5398, Eighty-second Congress, a bill to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of Llewellyn B. Griffith for retirement as an emergency officer under the provisions of Emergency Officers Retirement Act or as a disabled officer of the Regular Army of the United States. You requested a report of the facts in this case as disclosed by the records of the Department of the Army, together with an opinion on the merits of the bill.

This bill provides as follows:

"That jurisdiction is hereby conferred upon the Court of Claims of the United States, notwithstanding the lapse of time or any statute of limitations, or any other limitation upon the jurisdiction of such court, to hear, determine, and render judgment on the claim of Llewellyn B. Griffith arising out of the failure of the War Department to certify him for retirement as an emergency officer pursuant to the provisions of the Emergency Officers Retirement Act, as amended (45 Stat. 735), or to retire him as a disabled officer of the Regular Army of the United States, as the facts may justify. In its consideration of such claim, the court shall determine whether or not the said Llewellyn B. Griffith should have been certified for retirement as an emergency officer or retired as a disabled officer of the Regular Army. Should the court decide that the said Llewellyn B. Griffith should have been so certified or retired, judgment shall be rendered in an amount equal to the amount the said Llewellyn B. Griffith would have received had he been so certified or retired.

"SEC. 2. Suit upon such claim may be instituted at any time within four months after the date of the enactment of this Act. Proceedings for the determination of such claim, and appeal from, and payment of, any judgment thereon shall be in the same manner as in the case of claims over which the Court of Claims has jurisdiction as now provided by law."

Llewellyn B. Griffith (formerly known as Llewellyn Mason Griffith) was born in Baltimore, Md., on November 17, 1894, was appointed a cadet at the United States Military Academy on June 15, 1914, and was graduated therefrom on August 30, 1917. He was appointed a second lieutenant in the Corps of Engineers, Regular Army, effective August 30, 1917, and he executed the oath of office as such on October 10, 1917. On October 11, 1917, Lieutenant Griffith was promoted to the grade of first lieutenant in the Corps of Engineers, to rank from August 30, 1917, and he took the oath of office as first lieutenant on October 19, 1917. On October 12, 1917, Lieutenant Griffith was appointed a temporary captain in the Corps of Engineers, to rank from August 30, 1917, but on October 15, 1917, The Adjutant General of the Army wrote a letter to him advising him that he was not entitled to promotion to the rank of captain and directing that he return said commission to The Adjutant General. That commission was duly returned to The Adjutant General, and it was canceled, the face of the commission being marked "Canceled December 7, 1917." On October 30, 1917, Lieutenant Griffith was promoted to the temporary grade of captain in the Corps of Engineers, to rank as such from August 30, 1917, and he duly took the oath of office under that appointment on November 9, 1917. On December 31, 1917, a commission was issued appointing Captain Griffith provisionally to the rank of first lieutenant in the Corps of Engineers, to rank as such from August 30, 1917, but the records of the Department of the Army fail to disclose that he ever took the oath of office under that appointment.

On February 7, 1918, a commission was issued appointing Captain Griffith a temporary captain in the Corps of Engineers, but the records of the Department of the Army fail to disclose that he ever took the oath of office under such appointment. On November 29, 1918, a commission was issued giving Captain Griffith a recess appointment as a captain in the Corps of Engineers, to rank as such from October 23, 1918, but the records of the Department fail to disclose that he ever took the oath of office under that appointment. The last-mentioned appointment was superseded on March 8, 1919, when Captain Griffith was given a recess appointment as a captain in the Corps of Engineers, with rank from October 21, 1918, but the records of the Department of the Army fail to disclose that he ever took the oath of office under the appointment of March 8, 1919. On July 15, 1919, a commission was issued appointing Captain Griffith a captain in the Corps of Engineers, by and with the advice and consent of the Senate, to rank as such

from October 21, 1918. The records of the Department of the Army show that he took the oath of office as captain under that appointment on December 14, 1919. By Special Orders No. 98-0, issued by the Secretary of War, and dated April 26, 1920, Captain Griffith was honorably discharged from his temporary commission as captain.

On September 13, 1937, the claimant wrote a letter to The Adjutant General of the Army in which he referred to the commission dated December 31, 1917, appointing him a provisional first lieutenant and requested advice as to whether he ever became a provisional first lieutenant by virtue of such commission. On September 20, 1937, The Adjutant General advised the claimant that the commission dated December 31, 1917, appointing him a provisional first lieutenant was issued through error, that there was no record of it ever having been accepted and requested him to return it to The Adjutant General for cancellation.

Captain Griffith sailed for France on August 31, 1918, for service with the American Expeditionary Forces. He served in France with the Six Hundred and Third Engineers and participated in the Meuse-Argonne offensive. After the armistice on November 11, 1918, he served with the American Army of occupation in Germany until August 1919, when he returned to the United States. Captain Griffith states that he had mild attacks of asthma in France, but did not have a severe attack until December 1919, after he had returned to the United States.

It appears that on August 20, 1921, Captain Griffith entered upon duty with the Corps of Engineers on the Ohio River, where he continued to serve until August 1922. He states that while he was on duty on the Ohio River he suffered with an asthmatic condition, and it appears that in or about the month of July 1922 he requested a transfer at his own expense to San Antonio, Tex., but the request was not granted.

By the act of June 30, 1922 (42 Stat. 716, 721-723), the Congress directed a large reduction in the commissioned personnel of the Army, which was to be accomplished by the retirement and discharge of officers upon the recommendation of a board of general officers. The act provided, among other things, that "officers selected for elimination of less than ten years' commissioned service may, upon recommendation of the board * * *, be discharged with one year's pay * * *." For the purpose of carrying out the provisions of this act the War Department issued Circular No. 152, dated July 17, 1922, entitled "Regulations Governing Reduction in the Number of Officers." The regulations in question provided that "The officers retired or discharged will be those whom the board considers for any reason least suitable for retention under the circumstances" and that "In accomplishing the required reduction the interests of the Government will be paramount to those of individuals." The regulations also provided that reductions might be accomplished by retirement for disability, retirement for length of service, retirement or discharge of officers placed in class B under the provisions of the National Defense Act of 1916, or by dismissals and resignations.

On July 1, 1922, Captain Griffith filed an application with the Chief of Engineers, United States Army, for his discharge from the Army under the provisions of the act of June 30, 1922, supra. On July 21, 1922, the Chief of Engineers transmitted the application to The Adjutant General of the Army with the recommendation that he be discharged with 1 year's pay. Before any action was taken on that application Captain Griffith, on August 1, 1922, filed with The Adjutant General of the Army an application to appear before an Army retirement board, and there were attached to such application statements from certain private physicians who had treated him for asthma. He was thereupon ordered to report to the station hospital, Fort Sam Houston, Tex., on August 14, 1922, for observation and treatment. He appeared before a board of Army medical officers at said hospital on August 19, 1922, which on the same date submitted a report which reads in pertinent part as follows:

"Findings: 1. Captain Griffith has been a patient in this hospital since August 14, 1922.

"2. The board after careful consideration of the history, hospital records, and certificates of civilian physicians of San Antonio and physical examination of this officer, is unable to find any indication or symptoms of asthma since he entered the hospital.

"Conclusions: 1. That he is fit for full field service.

"Recommendations: 1. That he be returned to duty."

Thereafter on August 23, 1922, Captain Griffith filed with The Adjutant General of the Army another request that he be discharged from the Army under the

provisions of the act of June 30, 1922, supra. In his letter requesting his discharge Captain Griffith stated:

"1. In accordance with the provisions of paragraph 8, War Department circular No. 152, dated July 17, 1922, I desire to submit to the board the following statement relative to my present and probable future effectiveness.

"2. For a life career I do not like military service and therefore think that it is for the best interests of the Army that I be discharged.

"3. There are also many minor facts affecting me directly and indirectly which render my service to the Army less effective. For example I have asthma, which develops under certain climatic conditions and greatly handicaps me physically. Furthermore, my wife has not been well due to certain climatic conditions. Her health affects my efficiency indirectly. There are many other facts which taken together make me unsuited for military career.

"4. In view of the above I request that I be discharged with 1 year's pay so that I may start a civil life at this time."

Paragraph 8 of War Department Circular No. 152, dated July 17, 1922, cited by Captain Griffith in his above-quoted request for discharge, provided as follows:

"8. Any officer in the service, who so desires, may submit through military channels, for consideration by the board a statement bearing upon his past, present, or probable future effectiveness. Should the officer believe that, for any reason, it will be best for the interests of the service that he be retired or discharged, his statement will clearly set forth such reasons."

On October 11, 1922, The Adjutant General advised Captain Griffith that upon the recommendation of the board of general officers convened pursuant to the provisions of the act of June 30, 1922, supra, he had been selected by the President as one of the officers to be discharged in accomplishing the reduction in the number of officers in the Army that had to be made in accordance with that act, and that he would be discharged with 1 year's pay. Thereafter on November 10, 1922, Captain Griffith was honorably discharged from the Army with 1 year's pay. On the same date, and immediately prior to his discharge from the Army, Captain Griffith was given a general physical examination at the station hospital at Fort Sam Houston, Tex., and in his report of the examination the examining surgeon stated:

"I certify that—

"The officer named above [Capt. Llewellyn B. Griffith] has been given a careful physical examination, and it is found that:

"He is physically and mentally sound with the following exceptions:

(Describe the nature and location of the defect, wound, injury or disease.)

"Asthma, bronchial, probably chronic, was seen in one mild attack in September 1922.

"The wound, injury, or disease is not likely to result in death or disability.

"In my opinion the wound, injury, or disease did originate in the line of duty in the military service of the United States.

"In view of occupation he is 10 percent disabled."

At the time of his discharge from the Army this officer signed a formal statement in which he acknowledged receipt of the notice of his separation from the service, stated that he did not desire a commission in the Officers' Reserve Corps, and that he was suffering from the effects of a disease incurred in the military service of the United States.

The law in effect at the time the board of Army medical officers submitted its report on August 19, 1922, in which it found that Captain Griffith was fit for full field service and recommended that he be returned to duty, as well as at the time of his discharge from the Army on November 10, 1922, provided that for an Army officer to be retired because of physical disability it was necessary to find that he was incapacitated for active service and that his incapacity had resulted from an incident of service (sec. 1251 of the Revised Statutes; 10 U. S. C. 933). It, therefore, seems clear that Captain Griffith was not entitled in 1922 to be retired from the Army because of physical disability.

Since his discharge Captain Griffith has made a number of requests for retirement under the Emergency Officers' Retirement Act, approved May 24, 1928 (45 Stat. 735, 38 U. S. C. 581), for physical disability of service origin. That act provides in pertinent part as follows:

"That all persons who have served as officers of the Army, Navy, or Marine Corps of the United States during the World War, other than as officers of the Regular Army, Navy, or Marine Corps who during such service have incurred physical disability in line of duty, and who have been, or may hereafter, within one year, be, rated in accordance with law at not less than 30 per centum perma-

nent disability by the United States Veterans' Bureau for disability resulting directly from such war service, shall, from date of receipt of application by the Director of the United States Veterans' Bureau, be placed upon, and thereafter continued on, separate retired lists, hereby created as part of the Army, Navy, and Marine Corps of the United States, to be known as the emergency officers' retired list of the Army, Navy, or Marine Corps of the United States, respectively, with the rank held by them when discharged from their commissioned service, and shall be entitled to the same privileges as are now or may hereafter be provided for by law or regulations for officers of the Regular Army, Navy, or Marine Corps who have been retired for physical disability incurred in line of duty, and shall be entitled to all hospitalization privileges and medical treatment as are now or may hereafter be authorized by the United States Veterans' Bureau, and shall receive from date of receipt of their application retired pay at the rate of 75 per centum of the pay to which they were entitled at the time of their discharge from their commissioned service, except pay under the Act of May 18, 1920."

The name of the Veterans' Bureau was changed to Veterans' Administration on July 21, 1930 (38 U. S. C. 11). Inasmuch as the War Department and the Department of the Army have consistently refused to certify that Captain Griffith served as an emergency officer during World War I, the Veterans' Administration has declined to consider his application for retirement as an emergency officer under the Emergency Officers' Retirement Act of 1928.

Since Captain Griffith's discharge from the Army the following bills have been introduced in the Congress for his relief: S. 3780, Seventy-first Congress; H. R. 9609, Seventy-first Congress; S. 2281, Seventy-second Congress; H. R. 3954, Seventy-second Congress; S. 4436, Seventy-fourth Congress; S. 4446, Seventy-fourth Congress; H. R. 12232, Seventy-fourth Congress; S. 38, Seventy-fifth Congress; and S. 503, Seventy-sixth Congress.

The first bill in question, S. 3780, Seventy-first Congress, if enacted, would have provided "That any disability incurred in line of duty by Llewellyn B. Griffith while serving as an officer of the Army of the United States during the World War shall be deemed and considered to have been so incurred while serving as an officer of the Army of the United States other than as an officer of the Regular Army, so as to entitle said Griffith to the benefits and privileges of the Emergency Officers' Retirement Act (Public, Numbered 506, Seventieth Congress): *Provided*, That such disability rating is sufficient and said Griffith is otherwise eligible for retirement under the terms and conditions of said Act; *Provided further*, That said Griffith shall not be entitled to any back pay or allowances by the passage of this Act."

The War Department did not favor the enactment of any of the above-mentioned bills, and none of them was enacted.

On April 17, 1951, Captain Griffith filed an application with the Army Board on Correction of Military Records, requesting that his records in the Department of the Army be changed to show him eligible for retirement under the Emergency Officers' Retirement Act. It appears that he contended before said Board, and that he still contends, that he was an emergency officer from October 30, 1917 (the date he was promoted to the temporary rank of captain), until November 29, 1918 (when a commission was issued giving him a recess appointment as captain in the Corps of Engineers). On May 22, 1951, the Board submitted a report on the case to the Secretary of the Army, which reads in pertinent part as follows:

"The Board finds:

"1. That the applicant has exhausted all remedies afforded him by existing law or regulations.

"2. That upon graduation from the United States Military Academy, applicant was commissioned a second lieutenant in the Regular Army. That he was promoted to first lieutenant, Regular Army, October 19, 1917, and accepted such promotion October 20, 1917.

"3. That on October 13, 1917, applicant was erroneously promoted to the grade of captain in the Regular Army, which promotion was canceled by the Adjutant General on October 15, 1917, when it was found he was not entitled to such promotion. That the cancellation of the afore-mentioned promotion did not disturb or revoke applicant's status as the holder of a commission as first lieutenant in the Regular Army.

"4. That applicant was granted a temporary promotion to captain November 12, 1917, and received a permanent appointment as captain November 29, 1918. That the appointment and subsequent discharge of applicant as a temporary captain had no bearing on his continuing status as a commissioned officer in the Regular Army.

"The Board concludes:

"1. That it was the belief and intent of both the applicant and the Department of the Army that applicant was, and intended to continue to be, an officer of the Regular Army from the time of his original appointment to the Regular Army until his request for discharge therefrom.

"2. That the applicant was never an emergency officer within the meaning of the Emergency Officers' Retirement Act of 1928, and was not therefore eligible for retirement thereunder.

"3. That no error or injustice in the military records of the applicant is shown under the standards of procedure and administration then in effect and that the military records of applicant disclose no basis for granting his request.

"The Board recommends:

"That, in the case of former Captain Llewellyn B. Griffith, his application for correction of military records, dated April 17, 1951, be denied."

On May 28, 1951, Captain Griffith's application was denied by the Secretary of the Army in the following memorandum:

"Having received and approved the recommendations of the Army Board on Correction of Military Records in the case of former Capt. Llewellyn B. Griffith, no ASN, and under the authority vested in me by sec. 207 of the Legislative Reorganization Act of 1946 (Public Law 601, 79th Cong.), it is directed:

"That in the case of former Capt. Llewellyn B. Griffith, his application for correction of military records, dated April 17, 1951, be and hereby is denied."

For a person to be entitled to receive retired pay under the Emergency Officers' Retirement Act of 1928, *supra*, it is necessary to establish that he served as a commissioned officer during World War I other than as an officer of the Regular Army, Navy, or Marine Corps. Counsel for Captain Griffith have contended before the Department of the Army that inasmuch as he served as a temporary captain in the Corps of Engineers from October 30, 1917, until November 29, 1918, when a commission was issued giving him a recess appointment as a captain in the Corps of Engineers, he was during such period of time an emergency officer within the meaning and purview of the Emergency Officers' Retirement Act. The temporary promotion of Captain Griffith on October 30, 1917, to the grade of captain did not purport to be in any component of the Army other than the Regular Army. Such promotion was made pursuant to the authority of section 8 of the act of May 18, 1917 (40 Stat. 76, 81), as amended by the act of April 20, 1918 (40 Stat. 534), which authorized the temporary promotion of officers of the Regular Army below the grade of colonel before they were eligible for promotion to the next permanent grade in the Regular Army.

The case of Lt. Norman Scott Cooper involved in part the same principle involved in the instant case. In that case the evidence showed that on November 17, 1917, the claimant, a physician, entered upon active duty in the United States Navy as an emergency officer (lieutenant (junior grade) in the Naval Coast Defense Reserve); that on January 3, 1918, he was commissioned a lieutenant (junior grade) in the Medical Corps of the Regular Army; that on November 28, 1918, he was promoted to the temporary grade of lieutenant; and that he resigned from the Regular Navy effective December 24, 1919. It appears that after the enactment of the Emergency Officers' Retirement Act in 1928 Lieutenant Cooper sought retirement benefits thereunder. On March 12, 1930, the Comptroller General rendered a decision (9 Comp. Gen. 399) in which he held that Lieutenant Cooper was entitled to be retired under the Emergency Officers' Retirement Act by reason of his service as an emergency officer from November 17, 1917, to January 3, 1918 (the date of his appointment as an officer of the Regular Navy), but only at the grade of lieutenant (junior grade), the highest grade that had been held by him as an emergency officer. The Comptroller General specifically held that he was not entitled to be retired at the temporary grade of lieutenant to which he was appointed after he was commissioned a lieutenant (junior grade) in the Regular Navy. The Comptroller General in his decision on the case said (p. 404):

"In the case of Cooper, it will be noted that his emergency service was terminated by his appointment in the Regular Navy, that his grade or rank in the Naval Reserve Force (emergency service) was that of a lieutenant (junior grade), but that after his appointment in the regular Navy he was given a temporary advanced grade, that of lieutenant, as was the case with respect to practically all officers of the regular establishments. He is entitled to retirement and to pay under the act of 1928 on the basis of pay of the grade held by him when separated from his emergency status, that is, lieutenant (junior grade) notwithstanding that while under appointment in the Regular Navy, he was given a temporary appointment as lieutenant."

The Judge Advocate General of the Army has consistently held that individuals in circumstances similar to those of Captain Griffith were not entitled to be retired under the Emergency Officers' Retirement Act of 1928.

Inasmuch as the entire service of Captain Griffith in the United States Army was in the status of a Regular Army officer, he was never an emergency officer within the meaning of the Emergency Officers' Retirement Act, and, accordingly, was not entitled to the benefits of said act. He, therefore, could not legally be certified to the Veterans' Administration as an emergency officer.

Aside from the fact that the claimant is not legally entitled to the benefits of the Emergency Officers' Retirement Act, there is no equitable basis for the granting of the special relief proposed by this bill. As hereinbefore shown, the claimant on July 1, 1922, filed an application for his discharge from the Army as a surplus officer under the provisions of the act of June 30, 1922, but before any action was taken on that application he decided to and did seek to be retired on the ground of physical disability. After having been found by a board of Army medical officers to be suffering from no physical disability that would entitle him to retirement, and being found fit for full field service, he then renewed his application for discharge from the Army as a surplus officer in accordance with the provisions of the act of June 30, 1922, and was discharged under the provisions of that act, receiving 1 year's extra pay at the time of his discharge. The Veterans' Administration has advised the Department of the Army that Captain Griffith was first rated by the Veterans' Bureau on November 10, 1923, as having a service-connected temporary partial disability of 10 percent on account of bronchial asthma; that he was not rated as having a service-connected disability of 30 percent or more until December 27, 1929; and that he is now rated as having a 30 percent service-connected disability, but is receiving compensation of \$60 per month under a "Protected rating permanent partial 40 percent." Under this state of facts the Department of the Army can perceive no justifiable ground for the enactment of the extraordinary legislation proposed by this bill.

Counsel for Captain Griffith have cited as a precedent for the enactment of the present bill, S. 1991, Seventy-fourth Congress, approved March 16, 1936 (49 Stat. 2239), which was enacted for the relief of Wilson G. Bingham, formerly a captain in the Regular Army, who had been discharged as a surplus officer on December 15, 1922. That act provided, in pertinent part, as follows:

"That in the administration of the benefits and privileges of the Emergency Officers' Retirement Act of May 24, 1928 (45 Stat. 735), Wilson G. Bingham, late captain of Infantry, United States Army, shall be held to have been honorably discharged as an emergency officer and in the grade of captain of Infantry on December 15, 1922: *Provided*, That no back pay or allowances shall be held to have accrued prior to the passage of this Act."

Subsequent to the discharge of Captain Bingham from the Army it was determined by the Veterans' Administration that he was entitled to compensation by reason of service-connected disability in the amount of \$74 per month, or \$888 per annum. His service-connected disability was determined to be somewhat greater than that from which Captain Griffith was in 1922, and is now, suffering. Furthermore, it appears that the President approved S. 1991, Seventy-fourth Congress, for the relief of Captain Bingham, solely because he had previously committed himself to the approval of such legislation. This is shown by a letter from the President to the chairman, committee on Military Affairs, United States Senate, dated March 19, 1936, in which he set forth the facts concerning his approval of the bill and stated that such approval "should under no condition be considered as a precedent for any similar legislation." The text of said letter reads as follows:

"On March 6, 1936, the Congress sent to me for my approval S. 1991, Seventy-fourth Congress, entitled 'An act for the relief of Wilson G. Bingham.'

"This man as I understand it is a former Regular Army officer who served as such from the date of his graduation from the United States Military Academy, August 30, 1917, to December 15, 1922, when he voluntarily resigned his commission in order to return to civil life and who at no time served as an emergency officer. Thereafter he made claim of the Veterans' Administration for compensation on account of service-connected disability, which claim was duly adjudicated and he is now receiving \$888 per annum thereunder.

"Special relief legislation was subsequently passed by Congress to increase the benefits he was receiving, and on June 26, 1934, I vetoed H. R. 2632, Seventy-third Congress, entitled 'An act for the relief of Wilson G. Bingham,' which would have

provided for his retirement with the same privileges and pay as are provided for officers of the Regular Army, giving therefor the following reason:

"Because this officer voluntarily resigned 4 years after the close of the World War he should not be reinstated and retired as a captain.

"I would approve a bill to extend him the benefits of the Emergency Officers' Retirement Act."

"While at that time I was advised that such a proposal seemed to be feasible, nevertheless in considering this new bill S. 1991, certain aspects of law, as well as of equity and uniformity, have been brought to my attention which would have caused me to decide this matter also in the negative, had previous commitment not been made.

"I am therefore advising you that while I have approved this particular relief bill it should under no condition be considered as a precedent for any similar legislation, and I earnestly hope that any future bills of this character will not receive the approval of the committee."

Finally, the enactment of this bill would be highly discriminatory in that it would give to the claimant the right to sue the United States in the Court of Claims upon his claim for retirement benefits, a right that is not granted by general law to all other former officers in like circumstances, and there are no facts or circumstances present in this case which would warrant singling out this claimant for such preferential treatment.

A careful consideration of all the facts and circumstances in this case the Department of the Army is of the view that there is no legal or equitable basis for the enactment of this bill. It is, accordingly, recommended that the bill be not favorably considered by the Congress.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

FRANK PACE, Jr.,
Secretary of the Army.

MEMORANDUM

In a 12-page letter, dated February 8, 1952, the Secretary of the Army, in answer to a request from Hon. Emanuel Celler, chairman of the Committee on the Judiciary, House of Representatives, submitted a report on H. R. 5398, Eighty-second Congress, a bill to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of Llewellyn B. Griffith for retirement as an emergency officer under the provisions of the Emergency Officers Retirement Act or as a disabled officer of the Regular Army of the United States. The Secretary of the Army expresses opposition to enactment of the bill because he says there "is no legal or equitable basis" for its passage. In other words, the Secretary of the Army is opposed to extending to former Captain Griffith the right to have his day in court. We believe that an examination of the facts will convince anyone that there is both a legal and an equitable basis for enactment of H. R. 5398.

In view of a number of misstatements of fact in the Secretary's letter, we, as counsel for former Captain Griffith, feel that we should discuss his case at some length and point out some of the mistakes and discrepancies in the Secretary's letter.

In his report, the Secretary of the Army sets forth at considerably length what he claims the records of the Department of the Army disclose concerning this former officer. That recital of facts reveals a deplorable state of confusion concerning this officer, the issuance and withdrawal or attempted withdrawal of commissions, and a maze of contradictory orders and commissions. From the records of the Department of the Army, it is extremely difficult to determine just what did happen. This condition alone is an impelling reason for consideration of the evidence by an impartial judicial tribunal, free from bias, prejudice, and the military attitude of sustaining a mistake, once made, by the resort to every conceivable presumption, conjecture, and innuendo capable of being extracted from a condition or state of facts. A repetition of the recital of what the Secretary deems to be the facts is not considered necessary here. Reference, however, will be made to certain of those recitals of supposed facts, in an effort to demonstrate their inaccuracy and to indicate the need for further consideration of this officer's case, in the interest of justice, equity, and fair dealing.

The Secretary of the Army contends that Captain Griffith never was anything but a Regular Army officer. He points out however that when he graduated from the United States Military Academy, this former officer was appointed a

second lieutenant, and then, after referring to his appointment as a first lieutenant, the Secretary of the Army states that Captain Griffith was appointed a temporary captain in the Corps of Engineers on October 12, 1917, but on October 15, 1917, 3 days thereafter, The Adjutant General of the Army advised him by letter that he was not entitled to promotion to the rank of captain and directed him to return the commission as captain to The Adjutant General, which he did. That commission was marked "Canceled December 7, 1917."

The Judge Advocate General of the Army, the legal adviser of the Department of the Army, had held that "an appointment once made cannot be withdrawn until it is expressly or constructively refused by the appointee" (Opinions of J. A. G., 1918, vol. 2, p. 1012, 2 cases). In the two cases cited, The Adjutant General of the Army attempted to withdraw commissions issued to two officers. The Judge Advocate General expressed the opinion that the "attempted withdrawal by The Adjutant General was ineffective." Therefore, the direction of The Adjutant General to Captain Griffith to return the commission as captain issued on October 12, 1917, apparently, was illegal and ineffective.

Notwithstanding the fact that on October 15, 1917, The Adjutant General advised Captain Griffith that he was not entitled to promotion, on October 30, 1917, 15 days later, he was promoted to the temporary grade of captain, Corps of Engineers, and took the oath of office thereunder on November 9, 1917. On December 31, 1917, however, a commission was issued to this officer reciting that the President "reposing special trust and confidence in the patriotism, valor, fidelity, and abilities of Llewellyn B. Griffith, I have nominated and, by and with the advice and consent of the Senate, do appoint him provisionally a first lieutenant in the Corps of Engineers in the service of the United States." As he then was a captain, what legal effect did his appointment as a provisional first lieutenant have on his captaincy? Was he demoted, or was his commission as a captain vacated? The Secretary of the Army points out in his letter that "the records of the Department of the Army fail to disclose that he ever took the oath of office under that appointment." The Judge Advocate General repeatedly has held that taking the oath of office under an appointment in the Army during wartime is unnecessary if the officer is already in the service and previously took an oath under another appointment. After 20 years had elapsed, The Adjutant General of the Army, in a letter dated September 20, 1937, advised Captain Griffith that the commission as a provisional first lieutenant had been issued by mistake and asked him to return it for cancellation. It has not been returned. That was the second time Captain Griffith was asked to return a commission for cancellation. He complied with the first request, because he was in the Army at that time and considered any request from The Adjutant General or from superior military authority as a command. When the second request was received, Captain Griffith was no longer in the Army and felt under no obligation to return the commission for cancellation. The legality of that commission is one of the questions to be determined judicially in this case.

At the time of the issuance of the commission to Captain Griffith as a provisional first lieutenant, the Selective Service Act of May 18, 1917 (40 Stat. 76) authorized the appointment of Regular Army officers to higher grades in the emergency forces without vacating their Regular Army commissions, but it did not authorize the appointment of an officer in a lower or equal grade in the emergency forces without vacating his Regular Army appointment. It is important, therefore, to determine just what effect the appointment of Captain Griffith as a provisional first lieutenant had on his temporary appointment as captain.

On July 15, 1919, Captain Griffith was given a commission as captain in the Corps of Engineers, by and with the advice and consent of the Senate, and took the oath of office under that appointment on December 14, 1919. By Special Orders No. 98-0, dated April 26 1920, he and several other officers were honorably discharged from their "emergency commissions only." In his letter at page 2, the Secretary of the Army states that by the special order above mentioned, "Captain Griffith was honorably discharged from his *temporary* commission as captain." [Italics added.]

Who is right as to the status of this officer at that time, Gen. Peyton C. March, Chief of Staff, who issued Special Orders No. 98-0, or the present Secretary of the Army who, 32 years after the issuance of those special orders, impliedly says that General March did not know what he was talking about when he described Captain Griffith's appointment as an "emergency commission"? It seems most important that this difference of opinion be decided by a judicial tribunal on the evidence, rather than to let it rest with the Secretary of the Army, who, it seems, is willing to go to extreme lengths to sustain the position taken by the Department of the

Army in the face of positive evidence that the Chief of Staff, in 1920, characterized Captain Griffith's appointment as an "emergency commission." If he did not then occupy an emergency appointment, what was the necessity for appointing him a captain in the Regular Army on July 15, 1919? The Secretary of the Army says, at page 9 of his letter, that "The temporary promotion of Captain Griffith on October 30, 1917, to the grade of captain did not purport to be in any component of the Army other than the Regular Army" and on page 10 the following appears: "Inasmuch as the entire service of Captain Griffith in the United States Army was in the status of a Regular Army officer, he was never an emergency officer within the meaning of the Emergency Officers' Retirement Act, and, accordingly, was not entitled to the benefits of said act." In the face of the records describing Captain Griffith's appointment as an "emergency commission," necessitating his honorable discharge therefrom following his appointment as a captain in the Regular Army on July 15, 1919, the Secretary's positive statements are open to question. This and the Secretary's other mistaken assertions undermine confidence in his accuracy, to say the least. Another instance is the following:

At the bottom of page 3 and top of page 4 of his letter, the Secretary of the Army states that on July 1, 1922, Captain Griffith filed an application for discharge under the act of June 30, 1922, which was transmitted to The Adjutant General of the Army, with the recommendation that he be discharged with 1 year's pay. On page 4 the Secretary states that on August 23, 1922, Captain Griffith filed with The Adjutant General of the Army another request to be discharged, quotes that request, and on page 5 states that "on November 10, 1922, Captain Griffith was honorably discharged from the Army with 1 year's pay," implying that he was discharged upon the application quoted on page 4 of his letter. The Secretary of the Army fails to state that the application for discharge dated August 23, 1922, which he quoted in his letter, was withdrawn and was not the one on which Captain Griffith's discharge was based. Neither does the Secretary mention the confidential letter from The Adjutant General of the Army, dated November 4, 1922, advising Captain Griffith that "Confidential orders issued this date, copy inclosed herewith, announcing your honorable discharge from the service with 1 year's pay under the provisions of the act of September 14, 1922, to take effect November 10, 1922," and that "an official copy of your request to be discharged is also enclosed herewith." The Secretary, therefore, was wrong in stating in effect that Captain Griffith was discharged under the act of June 30, 1922, when, as stated at that time by The Adjutant General of the Army, he was discharged under the provisions of the act of September 14, 1922. Furthermore, the request to be discharged, an official copy of which was enclosed with The Adjutant General's confidential letter, was dated October 4, 1922, and reads in pertinent part as follows:

"1. I desire to be discharged from the Army in accordance with the provisions of War Department circular No. 152 as requested in my letter to the Adjutant General of the Army, dated August 23, 1922.

"2. In accordance with the provisions of paragraphs 10 and 14 of circular No. 152, I applied to appear before a retiring board on account of asthma which I have had at times since 1919, but after thorough physical examination my application has been disapproved because of insufficient evidence of physical disability.

"3. Since it is impractical for officers to choose their own stations to agree with their health, I feel that I am handicapped in performing efficient service in the Army due to continued attacks of asthma at many localities. There is no known cure for this malady. For these reasons and others which I have mentioned before I do not feel suited for military service as a peacetime career and am certain that my discharge would be for the future interests of the service."

The difference between the request on which Captain Griffith was discharged and the one quoted on page 4 of the Secretary's letter readily will be noted. In the letter constituting the basis of his discharge, Captain Griffith mentions his having applied to appear before a retiring board, which was denied. On discharge, he refused to sign the customary waiver of claims against the Government due to physical disability and insisted that he was entitled to retirement.

By the act of June 30, 1922 (42 Stat. 722), Congress directed a large reduction in the personnel of the Army, such reduction to be accomplished by retirement and discharge of officers upon recommendation of a board of general officers. In carrying out that act, the Department of the Army then named the War Department, issued circular No. 152, dated July 17, 1922, containing "Regulations governing reduction in the number of officers." These regulations provided, among other things, that the "officers retired or discharged will be those whom the

board considers for any reason least suitable for retention under the circumstances" and that "In accomplishing the required reduction the interests of the Government will be paramount to those of the individuals." The regulations also provided that reductions might be accomplished by retirement for disability, retirement for length of service, retirement or discharge of officers placed in class B under the provisions of the National Defense Act of 1916, or by dismissals and resignations. Commanding officers were directed to submit at once special reports and recommendations upon each officer believed for any reason to be considered for retirement or discharge.

A copy of War Department Circular No. 152 was sent to each Army officer, including Captain Griffith. On August 1, 1922, he requested retirement for physical disability, but his request was denied. Realizing that his physical condition was such that he could not perform satisfactory service, Captain Griffith requested discharge with 1 year's pay, as provided in the act of June 30, 1922, for officers of his length of service. He did not want to get out of the Army, but, as stated in his application, he realized that, due to his physical disability, he was less valuable to the service than officers to be retained and that sooner or later his physical condition would be such that he would be discharged for inefficiency. The Department of the Army has asserted a number of times that Captain Griffith voluntarily resigned from the Army. That is not correct. His request for discharge was based upon a realization, as stated above, that his physical condition did not permit him to render that character of efficient service he had performed in the past and which the Army would expect of him in the future. Those are the considerations which led up to his request for discharge, a right which was extended to him by the act of Congress referred to, although he then and ever since has maintained that he had a right to be retired for physical disability contracted in line of duty. Prior to being gassed while serving abroad, he had no physical disability and certainly no ailment affecting his lungs. Otherwise, he would not have been commissioned.

As pointed out by the Secretary of the Army on page 5 of his letter, Captain Griffith was physically examined at Fort Sam Houston, Tex., on the date of his discharge and was found by the examining medical officer to be 10 percent disabled because of "Asthma, bronchial, probably chronic." That medical officer, without any evidence whatever to support it, expressed the conclusion that "In my opinion the wound, injury, or disease did not originate in the line of duty in the military service of the United States." On the contrary, the Army medical records, relating to this officer, proved that, as already stated, he had no lung disorders when he entered the United States Military Academy nor during his rugged military service prior to being gassed in the battle of the Meuse-Argonne, as hereinafter more specifically mentioned. The Veterans' Administration has found since then that Captain Griffith is 40 percent disabled due to disease incurred in line of duty, and that if he served even 1 day as an emergency officer he would be entitled to retirement under the provisions of the Emergency Officers' Retirement Act of May 24, 1928 (48 Stat. 735, 38 U. S. C. 581), the pertinent part of which is quoted on page 6 of the Secretary's letter of February 8, 1952. The Secretary of the Army now seeks, by his report to the Congress, to deprive this former officer of the right to have a judicial tribunal determine from the available evidence as a fact whether he did in fact serve under an emergency commission, as was stated in Special Orders No. 98-0, hereinbefore mentioned, or whether all his service was under Regular Army commissions. That position of the Secretary seems now to be extremely unfair, inequitable, and unjust, particularly in view of the precedent established in the case of another officer who was graduated from the United States Military Academy on the same date as was Captain Griffith, and who, concededly, served only in the Regular Army, yet the Congress passed and the President approved an act authorizing his retirement under the provisions of the Emergency Officers' Retirement Act. That precedent is the case of Capt. Wilson G. Bingham, and the facts are briefly stated in the letter of the Secretary of the Army at pages 11 and 12.

On pages 7 and 8 of his letter of February 8, 1952, the Secretary of the Army quotes a part of the report of the Army Board on Correction of Military Records on Captain Griffith's request that his record be corrected to show that he is entitled to retirement under the Emergency Officers' Retirement Act. On page 8 of the Secretary's letter there is quoted from the report of the Board, the following finding:

"That the appointment and subsequent discharge of applicant as a temporary Captain had no bearing on his continuing status as a commissioned officer in the Regular Army."

That constitutes the statement of a conclusion of law which, if true, is not very flattering to the Department of the Army and its methods. If the "appointment and subsequent discharge" of Captain Griffith as a temporary captain had no bearing on his "continuing status as a commissioned officer in the Regular Army," then the appointment and issuance to Captain Griffith of the so-called temporary commission as a captain was an idle gesture and had no significance whatever. The finding of the Board from which we have quoted is a conclusion of law drawn from the facts considered by the Board. It is another illustration of the necessity of having the evidence in this case considered by an impartial judicial tribunal so that there then can be no question of the fairness and correctness of the court's findings.

Upon graduation from the United States Military Academy, Captain Griffith was notified by his superiors that he was a captain. He thereupon invested himself with the insignia of that rank and wore it during his entire military service. He never owned or wore the insignia of either a first or a second lieutenant, although the Secretary of the Army says in his letter that he was appointed a second lieutenant and then a short time later a first lieutenant, according to the records of his Department. The Judge Advocate General of the Army has held that "acceptance of an appointment to an office is necessary, but acceptance may be implied from the assumption by the appointee of the duties, rank, and insignia of the office, and such acceptance may be in advance of a formal notice of the appointment" (Opin. J. A. G., 1918, p. 1089).

Immediately after graduation Captain Griffith was assigned to duty as a captain with the One Hundred and Thirteenth Engineers, a National Guard (emergency) regiment from West Virginia. He later was transferred to the Six Hundred and Third Regiment of Engineers, an organization of emergency troops, and not those of the Regular Army. All his service during and for some time after termination of hostilities was with emergency troops, and it was not until July 15, 1919, that he was, according to our contention, commissioned in the Regular Army, when he was appointed by the President by and with the advice and consent of the Senate. As previously stated, some 9 months later he was honorably discharged from his emergency commission only by Special Orders No. 98-0, dated April 26, 1920.

Captain Griffith served with the American Expeditionary Forces in France from August 31, 1918, until the armistice on November 11, 1918, and thereafter with the Army of occupation in Germany until August 8, 1919, when he was returned to the United States. While serving with the American Expeditionary Forces he participated in the Meuse-Argonne offensive, and was gassed, but this incident is not mentioned in the letter of the Secretary of the Army to Mr. Celler.

It is our contention that Captain Griffith served as an emergency officer from November 9, 1917, until after his return to the United States on August 8, 1919. While serving abroad, this officer contracted asthma, and, due to service along the Ohio River, his condition became much worse. He has been rated by the Veterans' Administration as being 40 percent permanently disabled due to an ailment of service origin.

One of the fundamentals of American institutions and our way of life is that all citizens shall be equal under the law, yet we have two Army officers who were classmates at West Point receiving, at the hands of the Department of the Army, opposite treatment. Captain Bingham, upon recommendation of the Department of the Army, is receiving retirement benefits under the Emergency Officers' Retirement Act, while Captain Griffith, a more deserving officer, is receiving nothing thereunder. In addition, the Secretary of the Army now would deny Captain Griffith the right to have his case passed upon by a fair and impartial judicial tribunal, in order that the facts may be definitely determined from the maze of contradictory and conflicting evidence in the form of orders, correspondence, decisions and other documents issued by the Department of the Army. The Department of the Army does not want any other tribunal or agency to be the judge of what its records disclose, but wants to be the sole and only judge of what it has done in the past concerning this officer.

On page 2 of his letter, the Secretary of the Army states that "on November 29, 1918, a commission was issued giving Captain Griffith a recess appointment as a captain in the Corps of Engineers, to rank as such from October 23, 1918, but the records of the Department fail to disclose that he ever took the oath of office under that appointment. The last-mentioned appointment was superseded March 8, 1919, when Captain Griffith was given a recess appointment as a captain in the Corps of Engineers, with rank from October 21, 1918, but the records of

the Department of the Army fail to disclose that he ever took the oath of office under the appointment of March 8, 1919."

Significantly, the Secretary of the Army omits to state that his records show that the commission of March 8, 1919, was sent on April 5, 1919, to Captain Griffith's mother at Harpers Ferry, W. Va., with a memorandum attached thereto stating that, "This commission is mailed to you as present instructions forbid the mailing of commissions to officers with the American Expeditionary Forces," implying clearly that acceptance of the commission and execution of an oath of office were not necessary to make this appointment effective.

In the memorandum to Captain Griffith's mother transmitting the commission of March 8, 1919, The Adjutant General of the Army also stated "attached herewith is the commission evidencing the promotion of your son (Llewellyn B. Griffith, temporary captain, Corps of Engineers AEF) to the grade of captain in the Corps of Engineers, Regular Army, with rank from October 21, 1918". The use of the words "temporary captain, Corps of Engineers, AEF" and "captain in the Corps of Engineers, Regular Army," seems significant, and, we think, clearly implies that prior to his "promotion * * * to the grade of captain in the Corps of Engineers, Regular Army" Captain Griffith was not an officer in the Regular Army, but was an emergency officer in the American Expeditionary Forces. This, as already pointed out, is borne out by Special Orders No 98-0 April 26, 1920, discharging him from his emergency commission only. If he had been an officer in the Regular Army at that time, it would have been more appropriate for the Adjutant General to say in his memorandum to Captain Griffith's mother "Attached hereto is the commission evidencing the permanent appointment in the Corps of Engineers, Regular Army of your son (Llewellyn B. Griffith, temporary captain, Corps of Engineers, Regular Army)." Since the Secretary of the Army contends that Captain Griffith's entire service was in the Regular Army, the decision of judicial tribunal seems essential to determine his status, the precise meaning of the issuance of the numerous commissions, and the use by the Adjutant General of the Army of the word "temporary" and by the Chief of Staff of the word "emergency" in describing the same appointment. Only in that way can the conflicting statements of different officers of the Department of the Army ever be reconciled, if that is possible, and the exact status of this officer determined.

All that is sought by the enactment of H. R. 5398 is an opportunity for Captain Griffith to have his day in a court of justice where a judicial determination of his status may be obtained, in order that he may know, once and for all time, what, if any, rights he has to retirement. Instead of opposing enactment of this proposed legislation, the Secretary of the Army ought, in justice and fair dealing, to welcome its enactment, in order that finality may be the result in this case. Prolongation of the contentions of the Department of the Army on the one hand and those of Captain Griffith on the other cannot hope to result in a solution.

We have gone to this extreme length in an attempt to point out the many inaccuracies, omissions, misstatements, and errors in the letter of the Secretary of the Army, with a view to demonstrating the absolute necessity of referring Captain Griffith's case to a court of competent jurisdiction, in order that he may be accorded the right of having his case considered by a fair and impartial tribunal instead of by a prejudiced official of the Department of the Army, where all the mistakes, conflicting orders and commissions, and errors originated.

Respectfully,

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